Supreme Court, U.S.
FILED
JUN 7 1996
CLERK

No. 95-1820

In The
Supreme Court Of The United States
October Term, 1995

STATE OF CONNECTICUT,
Petitioner,

v.

STEPHEN CASSIDY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF OF RESPONDENT IN OPPOSITION

NEAL CONE
Assistant Public Defender

G. DOUGLAS NASH*
Public Defender
Office of Chief Public Defender
121 Elm Street
New Haven, CT 06510
(203) 789-7477

**Counsel of Record*

QUESTIONS PRESENTED

I. Whether a prosecutor is free to urge the jury to conclude that a defendant is lying in his testimony solely because he has been present throughout the trial and thus heard all the other witnesses testify, or whether such argument violates on federal constitutional grounds that defendant's Sixth Amendment right to face to face confrontation?

II. If such arguments do not violate the Sixth Amendment, whether in those jurisdictions which require a defendant to be present throughout trial, such as by statute or court rule of criminal procedure, fundamental fairness prohibits such arguments or requires remedial measures when they are made?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONSE TO PETITION FOR CERTIORARI 1

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR DENYING THE PETITION 6

I. THE DECISION BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL LAW GROUNDS 6

A. The adequacy of the state law ground is established by the Connecticut Supreme Court clearly holding there was a violation of the confrontation clauses of both the federal and Connecticut constitutions 6

B. The holding of the Connecticut Supreme Court that the state constitution had been violated was a decision made independently of its decision regarding the federal constitution 7

1. The Connecticut Supreme Court does not find that a violation of the confrontation clause of the Sixth Amendment automatically means that the confrontation clause of Article I, § 8 of the Connecticut constitution has also been violated 7

2. Since the practice of the Connecticut Supreme Court is to refuse to consider a state constitutional claim which it finds not to have been independently analyzed by a defendant, the clear holding of that court that this defendant suffered an infringement of his state constitutional right of confrontation shows that the holding reflects independent state law grounds 8

3. The Connecticut Supreme Court has clearly stated that when it finds the Connecticut constitution to have been violated, and in doing so has referred to federal cases, the federal cases are used as persuasive authority only 9

4. Even a cursory look at the opinion of the Connecticut Supreme Court in this case shows that references to federal precedent were used in stating general propositions of law or in illustrating analogous situations, not in deciding that an interpretation of federal precedent controlled the state constitutional holding 12

II. THE FEDERAL CONSTITUTIONAL CLAIM WAS CORRECTLY DECIDED 14

A. The Connecticut Supreme Court's decision was neither unprecedented nor unwarranted 14

1. This case involves urging jurors to draw an adverse inference solely from a defendant's exercise of one of his constitutional rights, which is patently unconstitutional 14

2. The federal constitutional right infringed upon was one this Court sees as ensuring the integrity of the fact finding process, which was properly considered in finding an impermissible burdening of that right in this case 16

3. Almost every jurist who has considered similar comments has found them to be constitutionally infirm, so the decision in the present case is hardly "unprecedented" 19

B. Even if, as petitioner asserts, this Court has a "longstanding doctrine that a defendant's rights are not violated when he must select between two rights that come into conflict", the decision here would not be contrary to such a doctrine . . 23

1. The respondent did not make a choice 23

2. The Connecticut Supreme court's decision included correct assessment that the policies behind the Sixth Amendment's confrontation clause were substantially impaired by the prosecutor's argument, while any counter-vailing policies behind the practice of argument to the jury were not substantially impaired, or not impaired at all 25

III. OTHER REASONS FOR DENYING THE PETITION 27

A. Since the respondent was required to be present at trial, he was "bushwhacked" by the prosecutor's argument, and disturbing the judgment of the Connecticut Supreme Court here so as to permit prosecutors' comments like those made in this case will require the Court to address the question of what procedures must be followed in those jurisdictions which require a defendant's presence at trial, which includes the federal courts . . . 27

B. If appellate opinions are used as a rough guide, the type of argument made by the prosecutor in this case has been rarely made 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases — Page

Arizona v. Evans, ___ U.S. ___, 115 S.Ct. 1185 (1995) 10, 11

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 16, 25

Brecht v. Abrahamson, 944 F.2d 1363 (7th Cir. 1991), aff'd, 507 U.S. 619 (1993) 28

California v. Green, 399 U.S. 149 (1970) 19

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) 16, 19

Coy v. Iowa, 487 U.S. 1012 (1988) 18, 19, 25

Crampton v. Ohio, decided with McGautha v. California, 402 U.S. 183 (1971) 24, 25, 26

Delaware v. Prouse, 440 U.S. 648 (1979) 7

Doyle v. Ohio, 426 U.S. 610 (1976) 28

Dyson v. United States, 418 A.2d 127 (D.C. App. 1980) 20, 21, 22

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 6

Griffin v. California, 380 U.S. 609 (1965) . . 13, 16, 17, 21

Grunewald v. United States, 353 U.S. 391 (1957) 27

Herring v. New York, 422 U.S. 853 (1975) 26

Illinois v. Allen, 397 U.S. 327 (1970) 18

Jenkins v. United States, 374 A.2d 581 (D.C. App.), cert. denied, 434 U.S. 894 (1977) 20, 21, 22

Kentucky v. Stincer, 482 U.S. 730 (1987) 17, 18, 19

Maryland v. Craig, 497 U.S. 836 (1990) 12, 19, 26

McGautha v. California, 402 U.S. 183 (1971) 17, 24

Michigan v. Long, 463 U.S. 1032 (1983) 6, 10, 11

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 10

Ohio v. Roberts, 448 U.S. 56 (1980) 17-18

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 29

Perry v. Leeke, 488 U.S. 272 (1989) 18

Rock v. Arkansas, 483 U.S. 44 (1990) 24

South Dakota v. Neville, 459 U.S. 553 (1983) 7

State v. Ball, 124 N.H. 226,
471 A.2d 347 (1983) 10

State v. Cassidy, 236 Conn. 112,
672 A.2d. 899 (1996) . . . . . 6, passim

State v. Jarzbek, 204 Conn. 683,
529 A.2d 1245 (1987), cert. denied,
484 U.S. 1061 (1988) 12, 19

State v. Johnson, 80 Wash. App. 337,
908 P.2d 900 (1996) 22, 23, 29

State v. Joly, 219 Conn. 234,
593 A.2d 96 (1991) 8, 9

State v. Jones, 234 Conn. 324, 662 A.2d 1199 (1995) 28

State v. Jones, 71 Wash. App. 798, 863 P.2d 85
(1993), rev. denied, 124 Wash.2d 1018,
881 P.2d 254 (1994) 20, 21, 22

State v. Joyce, 229 Conn. 10,
639 A.2d 1007 (1994) 11, 12, 14

State v. Kennedy, 295 Ore. 260,
666 P.2d 1316 (1983) 10

State v. Pinnock, 220 Conn. 765,
601 A.2d 521 (1992) 8

State v. Robinson, 227 Conn. 711,
631 A.2d 288 (1993) 8, 9

State v. Varszegi, 236 Conn. 266,
673 A.2d 90 (1996) 8, 9

Tehan v. U.S. ex rel. Shott, 382 U.S. 406 (1966) 17

United States v. Fitzpatrick, 437 F.2d 19 (2d Cir. 1970) . 28

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562 (1977) 7

Zant v. Stephens, 462 U.S. 862 (1983) 16, 17

CONSTITUTIONAL PROVISIONS

Constitution of the State of Connecticut

Article first, § 8 . . . . . 7, 8

Constitution of the United States

Fifth Amendment 17

Sixth Amendment . . . . . 7, passim

Fourteenth Amendment 26

MISCELLANEOUS

L. Bilionis, On the Significance of Constitutional Spirit, 70 N.C.L.Rev. 1803 (1992) 11

W. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977) 11

Connecticut Rules of Court § 879 (1996) 26

Connecticut Rules of Court § 968 (1993) 13, 27

Federal Rules of Criminal Procedure, Rule 43 27

W. Horton, The Connecticut State Constitution: A Reference Guide (1993) 12

5 J. Wigmore, Evidence (3d ed. 1940) 19

No. 95-1820

In The

Supreme Court Of The United States

October Term, 1995

STATE OF CONNECTICUT,

Petitioner

v.

STEPHEN CASSIDY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF OF RESPONDENT IN OPPOSITION

The respondent Stephen Cassidy respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of the State of Connecticut in this case.

OPINION BELOW

The opinion of the Supreme Court of Connecticut, which is the subject of the petition, is reported as State v. Stephen Cassidy, 236 Conn. 112, 672 A.2d 899 (1996).

JURISDICTION

The judgment of the Supreme Court of Connecticut was entered on February 27, 1996. The respondent maintains that the judgment rests on adequate and independent state law grounds and that the jurisdiction of this Court thus fails.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE STATE OF CONNECTICUT (1818)

ARTICLE 1, SECTION 8

As Amended by Article XVII (1982)

Section 8 of article first of the constitution is amended to read as follows:

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.

CONNECTICUT RULES OF COURT § 968

Presence of Defendant—Continued Presence Not Required.

The defendant must be present at the trial and at the sentencing hearing, but if he will be represented by counsel at the trial or sentencing hearing, the judicial authority may:

(1) Excuse him from being present at the trial or a part thereof or the sentencing hearing if he waives the right to be present;

(2) Direct that the trial or a part thereof or the sentencing hearing be conducted in his absence if the judicial authority determines that he waived his right to be present; or

(3) Direct that the trial or a part thereof be conducted in his absence if the judicial authority has justifiably excluded him from the courtroom because of his disruptive conduct, pursuant to Sec. 892.

CONSTITUTION OF THE UNITED STATES, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

According to the complainant, the respondent, who he had never met before nor known of, by agreement performed fellatio on him in the complainant's car, but soon stopped and demanded money while holding the blade of a jackknife against the complainant's penis. His further account of events are set out in part in the Connecticut Supreme Court's opinion and by the petitioner, as is part of the respondent's account, who had testified that he was a prostitute, and when the complainant said he wanted oral sex, he told him it would cost $20, and that the complainant had agreed to pay this. From there, according to the respondent, there was some sexual activity but no full payment, and he was left with $4 in pay after deciding he had wasted too much time.

The complainant testified that he was 19 at the time of the incident, a college student, and a part time tennis instructor at a local racquet club and that the person who had chosen to have sex with, the respondent, had been unshaven, with very messy hair, a "potholed" complexion, and very rotten, discolored teeth. He also testified that when he first gave his account to the police, he omitted any mention of the consensual sexual activity involved, because of embarrassment. He continued to deny that he had agreed to patronize a prostitute.

The respondent testified that after he had been partially paid with the $4, the complainant tried to coax him into resuming sex and bringing him to ejaculation before paying him the rest of the $20, but he refused and the complainant demanded his $4 back. Ultimately, in leaving the complainant's car, he told the complainant that if he did not like not being refunded his $4, he could go to the police officer who was in his cruiser at the end of the street and complain about being robbed.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL LAW GROUNDS

A. The adequacy of the state law ground is established by the Connecticut Supreme Court clearly holding there was a violation of the confrontation clauses of both the federal and Connecticut constitutions

This Court has stated that "we have long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.'" Michigan v. Long, 463 U.S. 1032, 1038 n.4 (1983), quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

This case was considered by the Connecticut Supreme Court en banc. State v. Cassidy, 236 Conn. 112, 112 n.1, 672 A.2d. 899 (1996). The majority, comprised of that court's Chief Justice and four of its six Associate Justices, saw fit to explicitly hold that "the prosecutor's argument impermissibly infringed upon [the defendant's] rights guaranteed under the confrontation clauses of the federal and state constitutions...." 236 Conn., at 129, 672 A.2d, 909 (emphasis added).[1]

This contradicts the petitioner's assertion that the majority referred but twice to the Connecticut constitution in its opinion, once in stating the respondent's claim, 236 Conn., at 120, and then "in setting forth the respondent's right's generally", as the petitioner puts it, Petition for Certiorari ("Pet.") at 9, citing to 236 Conn., at 122.

---

[1] "[W]e must determine whether the impropriety requires reversal of the defendant's convictions on the kidnapping, robbery and unlawful restraint charges. Because the prosecutor's argument impermissibly infringed upon his rights guaranteed under the confrontation clauses of the federal and state constitutions, he is entitled to a new trial on those counts unless the state can establish that the objectionable comments were harmless beyond a reasonable doubt." 236 Conn., at 129.

Since the Connecticut Supreme Court clearly held that the prosecutor's argument violated the state as well as federal constitution, "this would be an adequate state ground for decision...." South Dakota v. Neville, 459 U.S. 553, 556 n.5 (1983) (emphasis in original).

B. The holding of the Connecticut Supreme Court that the state constitution had been violated was a decision made independently of its decision regarding the federal constitution

1. The Connecticut Supreme Court does not find that a violation of the confrontation clause of the Sixth Amendment automatically means that the confrontation clause of Article I, § 8 of the Connecticut constitution has also been violated

If this Court has found that a decision rests on adequate state law grounds, see South Dakota v. Neville, supra, then in deciding whether it has jurisdiction, this Court has asked if the state court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did...." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977).

This Court has looked to see whether the state court "simply assumed that any violation of the [federal constitutional] privilege also violated, without further analysis, the state [constitutional] privilege." South Dakota v. Neville, 459 U.S., at 566 n.5. Applied to this case, the question would be whether "[a]s [this Court] understand[s] the opinion below, Article I § [8] of the [Connecticut] Constitution will automatically be interpreted at least as broadly as the [Sixth] Amendmen...." Delaware v. Prouse, 440 U.S. 648, 653 (1979).

But the Connecticut Supreme Court does not automatically interpret the confrontation clause of Article, I, § 8 of the Connecticut constitution as least as broadly as the Sixth Amendment; that court does not hold that a violation of the confrontation clause of the Sixth Amendment

thus necessarily violates the confrontation clause of Article I, § 8.

The Connecticut Supreme Court has emphasized that "[w]e have repeatedly apprised litigants that we will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue." State v. Robinson, 227 Conn. 711, 721, 631 A.2d 288, 295 (1993) (emphasis added; citing, "e.g.," ten of the court's past cases).[2]

2. Since the practice of the Connecticut Supreme Court is to refuse to consider a state constitutional claim which it finds not to have been independently analyzed by a defendant, the clear holding of that court that this defendant suffered an infringement of his state constitutional right of confrontation shows that the holding reflects independent state law grounds

The petitioner has claimed that "respondent's state court appellate brief fails to independently analyze his right of confrontation under the state constitution and seeks no greater protection thereunder than afforded by the federal constitution. In the absence of such an analysis, it has been the virtually unwavering practice of the Connecticut Supreme Court to confine its analysis to the federal constitution. State v. Varszegi, 236 Conn. 266, 269 n.4, [673] A.2d [90] (1996); State v. Joly, 219 Conn. 234, 258 n.16, 593 A.2d 96 (1991)." Pet. at 10.

But the Connecticut Supreme Court did not observe that the respondent in his brief to that court failed to independently analyze his right of confrontation under the state constitution. If it had, a hold-

---

[2] One of the example cases listed in State v. Robinson, supra, shows what happens when a defendant "claims...he was deprived of his right under the sixth and fourteenth amendments to the federal constitution to confront his accusers" and where he "also makes reference to the constitution of the state of Connecticut, but provides no independent analysis under its provisions." State v. Pinnock, 220 Conn. 765, 776 & n.3, 601 A.2d 521, 528 & n.3 (1992). The Connecticut Supreme Court refuses to address the state constitutional claim: "[a]ccordingly, we do not review his state constitutional claims." Id. (citation omitted).

ing that despite this failure in briefing there was a violation of that state constitutional right anyway would have been a remarkable, if not unprecedented, deviation from the requirement being enforced that without an independently analyzed claim of state constitutional error, the state constitutional law claim will not be reviewed. See State v. Robinson, 227 Conn., at 721, 631 A.2d, 29[illegible], and cases cited therein.

The Connecticut Supreme Court did not state that the respondent's claim of error raised under the state and federal constitutions was "incomplete[ly]" analyzed under the Connecticut constitution, compare State v. Varszegi, 236 Conn., at 269 n.4 (court confines its analysis "to the federal constitution"), or that he "fail[ed] independently to analyze the state constitution", State v. Joly, 219 Conn., at 258 n.16 ("we limit our analysis to the federal constitution"). Rather, the Connecticut Supreme Court noted that the respondent had not claimed that he was "entitled to additional protections under the state constitution...." 236 Conn., at 120 n.9. As Justice Callahan noted, the reference to "additional" protections was synonymous with reference to "greater" protections. See 236 Conn., at 146 n.1 (Callahan, J., dissenting).[3]

3. The Connecticut Supreme Court has clearly stated that when it finds the Connecticut constitution to have been violated, and in doing so has referred to federal cases, the federal cases are used as persuasive authority only

The petitioner has claimed that the Connecticut Supreme Court in

---

[3] "Although the majority briefly mentions the state constitutional right of confrontation, I do not understand the majority to hold that the scope of the right of confrontation is in any way greater under the state constitution than it is under the federal constitution." 236 Conn., at 146 n.1, 672 A.2d, 917 n.1 (Callahan, J., dissenting) (emphasis added). Part of footnote 9 of the majority opinion states that the defendant did not claim that he was entitled to "additional protections under the state constitution, and therefore we rest our decision on the federal constitution", after the relevant part of Article I, § 8 was quoted. 236 Conn., at 120 n.9 (emphasis added).

this case has relied "largely upon federal precedent" in crafting its opinion. Pet. at 10. This Court, in deciding whether it has jurisdiction, has looked to the use made of federal precedents in state court decisions: "If a state chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court reached." Michigan v. Long, 463 U.S., at 1041.

Justice Ginsburg, joined by Justice Stevens, has asked "[c]an the highest court of a State satisfy Long's 'plain statement' requirement in advance, through a blanket disclaimer?" Arizona v. Evans, ___ U.S. ___, 115 S.Ct. 1185, 1201 (1995) (Ginsburg, J., dissenting), citing State v. Ball, 124 N.H. 226, 233, 471 A.2d 347, 352 (1983); State v. Kennedy, 295 Ore. 260, 267, 666 P.2d 1316, 1321 (1983). The language used in Michigan v. Long makes it appear that in each case where a holding is made under a state constitution that appears to have drawn heavily on federal precedent, a disclaimer "need" be made that federal precedent is being used for persuasive authority only. See id., 463 U.S., at 1041.

However, this Court, at least to the respondent, has not explicitly held that a blanket disclaimer in advance would be unavailing. See Arizona v. Evans, ___ U.S. ___, 115 S.Ct., 1189-91 & nn. 2-4. If intelligent exercise of this Court's appellate powers compels it "to ask for the elimination of the obscurities and ambiguities" in state court decisions where a jurisdictional question might be raised, Arizona v. Evans, supra, ___ U.S. ___, 115 S.Ct., 1190 (emphasis added), quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940); and the Court

has been concerned about the "intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court" and to "provide state judges with a clearer approach to develop state jurisprudence unimpeded by federal interference, and yet [to] preserve the integrity of federal law", Arizona v. Evans, ___ U.S. ___, 115 S.Ct., 1189 (emphasis added), quoting Michigan v. Long, 463 U.S., at 1041; the choice by a state's highest court of appeals to rely on a blanket disclaimer in advance that explains that references to federal law in its decisions under its state constitution are for persuasive effect should sufficiently reconcile these concerns.

The Connecticut Supreme Court has issued such blanket disclaimer:

> When interpreting the contours of our state charter of liberty, it is clear that we may look to federal precedent. [citations] [S]ee Michigan v. Long, 463 U.S. [, at 1041]...(recognizing that in interpreting a state constitution, a state court may "rely on federal precedents as it would on the precedents of all other jurisdictions"). We employ this precedent for guidance and analogy when the federal authorities are "logically persuasive and well-reasoned." W. Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv.L.Rev. 489, 502 (1977) ("state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees").

State v. Joyce, 229 Conn. 10, 19-20, 639 A.2d 1007, 1013 (1994). As the court had earlier explained, "[i]t is important to note that our adoption of an analytical framework or methodology used under the federal constitution does not compel this court to reach the same outcome that a federal court might reach when the methodology is applied to a particular set of factual circumstances." Id., 229 Conn., at 18 n.12, 639 A.2d, 1012 n.12, citing L. Bilionis, On the Significance of Constitutional Spirit, 70 N.C.L.Rev. 1803, 1808-09 (1992).

These statements in State v. Joyce, supra, explain in advance that federal precedent is being used in the Connecticut Supreme Court's state constitutional holdings for persuasive, not controlling, effect.

4. Even a cursory look at the opinion of the Connecticut Supreme Court in this case shows that references to federal precedent were used in stating general propositions of law or in illustrating analogous situations, not in deciding that an interpretation of federal precedent controlled the state constitutional holding

The Connecticut Supreme Court cited some of this Court's opinions and some of its own opinions in noting the importance of a right to confrontation, the explicit provision of such right in both the federal and Connecticut constitutions, that the right to physical confrontation was a fundamental component of the federal and state confrontation clauses, and that an accused person was guaranteed the right to be present in the courtroom at every stage of his (or her) trial. State v. Cassidy, 236 Conn., at 122 (citations omitted).

Then, in describing the various benefits to the criminal justice system stemming from physical confrontation in the courtroom, the Connecticut Supreme Court cited several of this Court's past decisions and State v. Jarzbek, 204 Conn. 683, 695, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061 (1988). Then, the court noted that because of these benefits, the free exercise of the right to physical confrontation could not be impaired without a compelling justification. Cited "e.g.", were Maryland v. Craig, 497 U.S. 836, 850 (1990); and State v. Jarzbek, supra, 704-05. State v. Cassidy, 236 Conn., at 123-24.

State v. Jarzbek, supra, has been described as "[t]he only significant state constitutional case concerning the confrontation clause" by W. Horton, The Connecticut Constitution: A Reference Guide (1993), at the time that work was published. See id., 55.

After weighing the defendant's claim against the state's contentions in a long paragraph in which the only thing cited was Connecticut Rules of Court § 968 (defendant required to be present at trial unless excused by court), the Connecticut Supreme Court considered the nature of the specific argument that the prosecutor in this case made and decided it placed too high a price on his right to a face to face encounter with the prosecution's witnesses.[4] Cassidy, 236 Conn., at 124-25.

The court then went on to note that it was "well settled" that a constitutional violation can occur without complete abridgement or deprivation of that right, such as when state action "unnecessarily chills or penalizes the free exercise of the right. 236 Conn., at 126. As examples, the court cited, "e.g.", six of this Court's cases and one of its own cases. 236 Conn., at 126-27. In the next paragraph, the court linked up that concept with what had happened in the instant case, first as a general proposition that inviting the fact finder to draw an inference adverse to a defendant solely because he asserted a constitutional right was not to be tolerated, citing two of this Court's cases. 236 Conn., at 127. The court then noted that prosecutorial comments similar to what had been made in the respondent's trial had been disapproved as constitutionally infirm by those courts in other jurisdictions that have considered them, citing two District of Columbia Court of Appeals cases and a Washington state case. State v. Cassidy, 236 Conn., at 127-28.

In the concluding paragraph of its discussion about whether error

---

[4] The trial prosecutor's assertion to the judge that he was not pointing out anything that the jurors could not see for themselves was remarkably similar to the State of California's argument to this Court in Griffin v. California, 380 U.S. 609, 614 (1965). To show that there was a difference between what the jurors might observe for themselves and what was solemnized as evidence against the accused by comment to the jury on the other hand, Griffin was quoted. See 236 Conn., 125-26 nn.14-15.

had occurred, one Connecticut case was cited, in distinguishing what would have been permissible for the prosecutor to have argued to the jurors. See State v. Cassidy, 236 Conn., at 128-29.

As cursory review of the court's opinion reveals, federal precedent was used, as was Connecticut state precedent and the opinions of courts of other jurisdictions, in crafting an opinion which hardly "relies exclusively on federal law" except for the two references to the Connecticut constitution that the petitioner has noted to this Court. See Pet. at 9-10.[5] In reasoning through from what the right to physical confrontation provides as benefits under both the federal and state constitutions, to the conclusion that both rights were violated in this case, federal precedent was not relied upon except "for guidance and analogy", see State v. Joyce, supra, 229 Conn., at 20, in deciding the issue under both the federal constitution and the state constitution.

II. THE FEDERAL CONSTITUTIONAL CLAIM WAS CORRECTLY DECIDED

A. The Connecticut Supreme Court's decision was neither unprecedented nor unwarranted

1. This case involves urging jurors to draw an adverse inference solely from a defendant's exercise of one of his constitutional rights, which is patently unconstitutional

As one of the two reasons why this Court should grant his petition, the petitioner has claimed that the Connecticut Supreme Court has ruled that a criminal defendant's Sixth Amendment right to be present at trial and confront his accusers is violated whenever a prosecutor asks a jury

---

[5] As noted earlier, the petitioner overlooked the explicit holding that the state constitutional right to confrontation had been violated, State v. Cassidy, 236 Conn., at 129. Moreover, there was a fourth mention of the Connecticut constitution, on page 129, in footnote 18. Id. And the second reference, "setting out the respondent's right's generally", as petitioner calls it, is no mere passing mention but instead goes into some detail on the subject. See ibid., at 122.

to consider the defendant's presence at trial when assessing his credibility. This ruling is an unprecedented and unwarranted expansion of the Sixth Amendment right of confrontation...." Pet. at 8 (emphasis added).

However, the Connecticut Supreme court decided that "[w]e agree with the defendant that the prosecutor's argument invited the jury to draw an inference adverse to the defendant solely because he asserted his constitutional right to be present at trial and, consequently, that these comments unreasonably interfered with the defendant's free exercise of that right." Cassidy, 236 Conn., at 120, 672 A.2d, 904 (emphasis added). The Connecticut Supreme Court decided that "[i]nviting the fact finder to draw an inference adverse to a defendant solely on account of the defendant's asserting of a constitutional right impermissibly burdens the free exercise of that right and, therefore, may not be tolerated." Id., at 127, 672 A.2d, 908. "[T]he prosecutor invited the jury to draw an inference adverse to the defendant solely because of the defendant's exercise of his constitutional right to confront the witnesses against him." 236 Conn., at 127-28, 672 A.2d, 908 (emphasis added).

"[I]n defending the propriety of his argument to the trial court in response to the defendant's request for a curative instruction, the prosecutor relied only upon the fact that the defendant had been present throughout trial." See State v. Cassidy, 236 Conn., at 126 n.14, 672 A.2d, 907 n.14 (emphasis added). The prosecutor had argued to the trial court that "[i]t's fair comment...for the State to be able to discredit the defendant's testimony by means of the fact that he heard everyone else's testimony." Id.

As the Connecticut Supreme Court recognized, "for an agent of the State to pursue a course of action whose objective is to penalize a per-

son's reliance on his legal rights is 'patently unconstitutional'". Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978), quoted at 236 Conn., at 127, 672 A.2d, 907. When a state agent's only basis for penalizing a constitutional right is that it was asserted, that is patently unconstitutional. Chaffin v. Stynchcombe, 412 U.S. 17, 32 n.20 (1973).

2. The federal constitutional right infringed upon was one this Court sees as ensuring the integrity of the fact finding process, which was properly considered in finding an impermissible burdening of that right in this case

The Connecticut Supreme Court did nothing unprecedented nor unwarranted by linking the prosecutor's argument in this case to the concept that "[i]nviting the fact finder to draw an inference adverse to a defendant solely on account of the defendant's assertion of a constitutional right impermissibly burdens the free exercise of that right and, therefore, may not be tolerated." Cassidy, 236 Conn., at 127, 672 A.2d, 908. It cited as examples Zant v. Stephens, 462 U.S. 862, 885 (1983), where this Court held that an aggravating factor in a sentencing procedure would be invalid if it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected";[6] and Griffin v. California, 380 U.S. 609, 614 (1965), where this Court held that statements to jurors by the trial court or prosecutor to draw an adverse inference due to a defendant's election not to testify violated the fede-

---

[6] The petitioner's description of this part of the Zant opinion allows for it to be read at first as if this Court would have found this permissible: "the Court noted, without further discussion or analysis, that the aggravating factor was not 'invalid because it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected.'" Pet. at 13, quoting Zant v. Stephens, supra. But this Court then stated that if the aggravating circumstance at issue in that case had authorized the jury to draw adverse inferences from conduct that was constitutionally protected, then it would be invalid. Id., 462 U.S., at 885. The "not invalid" language was used by the Court in giving examples of what would be invalid but did not apply in that case because the aggravating circumstance was invalid for a different reason. Ibid.

ral constitution as "a penalty imposed by courts for exercising a constitutional privilege". Cassidy, 236 Conn., at 127, 672 A.2d, 908.

According to the petitioner, "[t]he Zant decision, however, is devoid of any discussion of the relationship between constitutionally protected conduct and the state's use of same to impeach a defendant's credibility" and so that case "offers little support for the result reached in the instant case", and likewise for Griffin v. California, supra, because in that case "the accused never took the witness stand and, therefore, never placed his credibility in issue." Pet. at 13-14.

The petitioner argues that "[t]o the extent that the prosecutor's comment on the defendant's presence burdened his Sixth Amendment right of confrontation, it did not do so unconstitutionally." Pet. at 14. Instead, the petitioner argues, it was just a matter of the respondent having been required to choose which course to follow. Id., citing McGautha v. California, 402 U.S. 183, 213 (1971).

But McGautha was a Fifth Amendment privilege against compelled self incrimination case. Id., 402 U.S., at 213. This Court has stated that "the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth." Tehan v. U.S. ex rel. Shott, 382 U.S. 406, 416 (1966) (emphasis added).

By contrast, the constitutional right that the defendant in this case exercised, and was penalized for by the prosecutor's argument to the jurors, which was left undisturbed by the trial court, was the right to confrontation, which "is a functional one for the purpose of promoting reliability in a criminal trial." Kentucky v. Stincer, 482 U.S. 730, 739 (1987). The "underlying purpose" of the Sixth Amendment's Confrontation Clause is "to augment accuracy in the factfinding process...." Ohio

v. Roberts, 448 U.S. 56, 65 (1980).

The right to face to face confrontation and the right to cross-examine prosecution witnesses, a "less explicit component of the Confrontation Clause", both "'ensur[e] the integrity of the fact-finding process.'" Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988), quoting Kentucky v. Stincer, 482 U.S., at 736.

The right to face to face confrontation makes it more difficult for a witness to lie about the accused or to tell a lie when it would greatly harm him. And "even if the lie is told, it will often be told less convincingly" because the jury might be clued by the witness' demeanor while telling such a lie. Coy v. Iowa, 487 U.S., at 1019. Such demeanor evidence may be prompted entirely or in large part by the fact that the witness is face to face with the accused. Id., & n.2. These benefits to the truth seeking process may come either on direct examination of the witness or on cross-examination or both.

But the accused's presence also enhances the reliability of the factfinding process in another important way. "Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way." Perry v. Leeke, 488 U.S. 272, 282 (1989). "[O]ne of the defendant's primary advantages of being present at trial [is] his ability to communicate with his counsel," Illinois v. Allen, 397 U.S. 327, 344 (1970); such as during the direct examination of prosecution witnesses so as to be "available to assist his counsel as necessary" in preparing for the cross-examination of these witnesses, and continuing on through their cross-examination, to still be available to assist counsel as necessary, so that the accused can be said to have had an opportunity for full and

effective cross-examination. See Kentucky v. Stincer, 482 U.S., at 740.

So, in this way, too, an accused's presence during the testimony of prosecution witnesses contributes to the effectiveness of defense counsel's cross-examination of them, and "the Court has recognized that cross-examination is 'the greatest legal engine ever invented for discovery of truth.'" Kentucky v. Stincer, 482 U.S., at 736, quoting California v. Green, 399 U.S. 149, 158 (1970), which quoted 5 J. Wigmore, Evidence § 1367, p.29 (3d ed. 1940).

The Connecticut Supreme Court, just noting some of the benefits to the truth-seeking process that come from face-to-face confrontation, State v. Cassidy, quoting Coy v. Iowa, supra, 487 U.S., at 1019-20, and State v. Jarzbek, supra, 204 Conn., at 695, took this into account when it found that if all that a prosecutor could point to was that the defendant's presence throughout the trial gave him the opportunity to color his testimony, and so he should not be believed, there was no "compelling justification for the infringement." State v. Cassidy, 236 Conn., 123-24, citing Maryland v. Craig, 497 U.S. 836, 850 (1990); State v. Jarzbek, supra, 204 Conn., at 704-05. In determining whether a constitutional right has been impermissibly burdened, a court takes into consideration the legitimacy of the challenged state action. See Chaffin v. Stynchcombe, supra, 412 U.S., at 32 & n.20. The Connecticut Supreme Court made the correct decision under the facts of this case.

3. Almost every jurist who has considered similar comments has found them to be constitutionally infirm, so the decision in the present case is hardly "unprecedented"

The petitioner has claimed that the Connecticut Supreme Court's decision was "unprecedented...." Pet. at 8. Yet, the court noted that although it was a question of first impression in Connecticut, "similar

prosecutorial comments have been disapproved as constitutionally infirm in other jurisdictions that have considered them." State v. Cassidy, 236 Conn., 128, citing Dyson v. United States, 418 A.2d 127, 131 (D.C. App. 1980); Jenkins v. United States, 374 A.2d 581, 584 (D.C. App.), cert. denied, 434 U.S. 894 (1977); State v. Jones, 71 Wash. App. 798, 809-11, 863 P.2d 85 (1993), rev. denied, 124 Wash.2d 1018, 881 P.2d 254 (1994).[7]

Justice Callahan, in his dissenting opinion, perceived a distinction between finding comments to be "constitutionally infirm" and finding comments to be a constitutional violation. According to Justice Callahan, State v. Jones, supra, was inapposite because the comment at issue involved the defendant's eye contact with the victim during her testimony. And, he noted, both the Dyson and Jenkins courts treated the comments under the standard due process analysis for allegedly improper comment, with the comments in Jenkins found not to rise to the level of substantial prejudice, while the comments at issue in Dyson did, but were part of a combination of improper comments. State v. Cassidy, 236 Conn., at 152 n.4 (Callahan, J., dissenting).

But the reason why the Jenkins court analyzed the comments under the standard due process analysis for prosecutorial misconduct was because that was the way the issue was presented to the court. See id., 374 A.2d, at 583. The same goes for the way the issue was presented to the Dyson court. See id., 418 A.2d, 129.

The Jenkins court noted that the prosecutor "suggested that appellant's presence during trial facilitated his ability to fabricate. In effect, the prosecutor sought to have the jury draw adverse inferences

---

[7] The respondent, in his brief to the Connecticut Supreme Court, at p. 36 & n.30, set out the facts and relevant part of the Dyson opinion, and in his reply brief, at p. 13 & n. 12, cited Jones and noted its facts.

from appellant's exercise of his right to confront the witnesses against him. Cf. Griffin v. California, [supra]. This, we think, was improper, and in the future, such comments on a defendant's presence in the courtroom should not be countenanced by the trial court." Jenkins v. United States, 374 A.2d, at 584.

The Dyson court dealt with an argument to the jury similar to that made in the instant case: "and you must remember, Mr. Dyson heard all the testimony, as he was the last one to testify....[¶] He listened to what everyone said and then he gets up and tells his story." The court noted that "[w]e have construed such an argument as an apparent attempt by the prosecutor to have the jury draw adverse inferences from appellant's exercise of his constitutional right to confront witnesses." Id., 418 A.2d, at 131, citing, among other cases, Jenkins, supra.

In Dyson, as in the instant case, the jury was left to decide who to believe in a proverbial swearing match. Id., 418 A.2d, 132 ("[t]he jury's assessment of the believability of either version was dispositive of its finding of guilt or innocence"); State v. Cassidy, 236 Conn., at 130 ("[t]he jury's principal task...was to determine which of these two witnesses to believe, making their credibility decisive to the outcome of the case"). The Dyson court found that even if some of the other improper comments were neutralized by general instructions of the trial court, "the defense was still faced with the dangers inherent in the impermissible suggestions that the jury might draw adverse inferences from the absence of evidence and the presence of the defendant." Accordingly, the Dyson court found there was reversible error. Id., 418 A.2d, at 132.

And while Justice Callahan in his dissenting opinion found State v. Jones, supra, to be inapposite because it dealt with comment on the ac-

cused's eye contact with his accuser, the majority of the Connecticut Supreme Court did not. A look at Jones shows that it was similar enough to warrant citing. Jones "claim[ed] that his right of confrontation was compromised by the prosecutor's questions on cross examination and the remarks made in closing argument regarding his staring at A. during her testimony." State v. Jones, 863 P.2d, at 93. The court then undertook a Sixth Amendment Confrontation Clause analysis, having been asked to do so instead of having been asked to undertake a standard prosecutorial misconduct due process analysis as in Jenkins and Dyson, supra, and found constitutional error because "Jones was validly exercising his right of confrontation and the State's commentary did constitute an impermissible use of constitutionally protected behavior." However, it found the error to have been harmless beyond a reasonable doubt because the evidence against Jones, including his own admission, was overwhelming. State v. Jones, 863 P.2d, at 93-94.

That State v. Jones presented a sufficiently similar scenario to what occurred in the instant case was further borne out when the same court that decided Jones relied heavily on what had occurred in that case and in Dyson, supra, where the "[d]efendant contend[ed] that the prosecutor, in rebuttal argument, impermissibly commented on his exercise of his constitutional right to be present at trial." State v. Johnson, 80 Wash. App. 337, 339, 908 P.2d 900, 901 (1996).[8]

---

[8] The prosecutor began his rebuttal argument with "[m]embers of the jury, I would like to submit to you that the one and only witness who had a bird's eye view of everything that happened, the only one witness that could watch the entire proceeding take place, to fit his testimony to suit the evidence that was entered earlier, and that's the defendant." [¶] Before the defendant took the stand, he heard testimony on Wednesday and on Thursday....He had all the time from Thursday from 3:30 to Monday, today, at 1:20 to decide what his testimony would be." Defense counsel's objection was sustained and the jury instructed to disregard

In no uncertain terms, the Washington Court of Appeals held that "[t]he prosecutor's comments about the defendant's unique opportunity to be present at trial and hear all the testimony against him impermissibly infringed his exercise of his Sixth Amendment rights to be present at trial and confront witnesses. He did not merely argue inferences from the defendant's testimony, but improperly focused on the exercise of the constitutional right itself." State v. Johnson, 80 Wash. App., at 341, 908 P.2d, 902. The court noted that "[t]ypically, we examine whether prosecutorial misconduct denied the defendant a fair trial and reverse if there is a substantial likelihood that the comments affected the verdict" but "[w]hen a prosecutor's comments also affect a separate constitutional right, they are subject to the stricter standard of constitutional harmless error." Id. (both cites) (citations omitted).[9]

As the cases cited above show, the Connecticut Supreme Court's decision on Sixth Amendment grounds was hardly unprecedented, but represents a mainstream view.

B. Even if, as petitioner asserts, this Court has a "longstanding doctrine that a defendant's rights are not violated when he must select between two rights that come into conflict", the decision here would not be contrary to such a doctrine

1. The respondent did not make a choice

The petitioner has claimed that the Connecticut Supreme Court's decision was "contrary to this Court's longstanding doctrine that a defen-

---

the comments on the sequence of the testimony. But the prosecutor then continued: "I would suggest the defendant had fit his testimony, to tailor his testimony to what came before--." Another objection was sustained. State v. Johnson, 80 Wash. App., at 340-41, 908 P.2d, 902.

[9] While Johnson's credibility was at issue because he testified, the error was found harmless beyond a reasonable doubt because the evidence against him was overwhelming. State v. Johnson, 80 Wash. App., at 342, 908 P.2d, 902-03.

dant's rights are not violated when he must select between two rights that come into conflict." Pet. at 8. Later, quoting from McGautha v. California, supra, 402 U.S., at 213, the petitioner claims that the federal constitution does not always forbid a defendant from being required to make choice, even if it involves a constitutional right. Pet. at 14.

In context, it appears that the petitioner is claiming that allowing comment on the defendant's exercise of his Confrontation Clause right to be present throughout trial if he testifies is a price that he can be required to pay if he decides to go ahead and also exercise his constitutional right to testify.[10] See Pet. at 11-15.

The first flaw in this argument is that even if, for the sake of argument here only, it is permissible for a prosecutor to argue to the jury that solely on the basis of the defendant's presence throughout the trial, his testimony should not be believed, the respondent did not make a choice to pay this price so that he could exercise both his right to be present throughout the trial and the right to testify.

As the Connecticut Supreme Court recognized, this was "a question of first impression in this state," State v. Cassidy, 236 Conn., at 128; and so the respondent, when he decided to testify, cannot be seen to have thereby implicitly decided to pay the price exacted by the prosecutor's argument to the jury about his exercise of his right to be present throughout the trial.

By comparison, in Crampton v. Ohio, decided with McGautha, supra, the Court noted that "[i]n Crampton's case, in accordance with Ohio law"

---

[10] The Connecticut Supreme Court had noted that the prosecutor's comment also burdened the respondent's federal constitutional right to testify on his own behalf, citing Rock v. Arkansas, 483 U.S. 44, 51-53 (1990), but because the respondent had not raised such claim, the court stated that "we do not base our decision on it." 236 Conn., at 128 n.16.

the jury determined guilt and punishment in a unitary proceeding, 402 U.S., at 185 (emphasis added); and the Court had to decide whether the choice required by Ohio of Crampton having to relinquish his Fifth Amendment right not to be compelled to be a witness against himself in the guilt phase of his trial so as to be heard on the issue of punishment and to not have his sentenced fixed without the benefit of all the relevant evidence, Fourteenth Amendment due process rights, was constitutionally permissible. Crampton v. Ohio, 402 U.S., at 211.

In this case, however, "the Court [is] dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right...." See Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978) (analyzing other cases). The respondent made no choice in this case to have one constitutional right penalized as the price of his exercising another constitutional right; his decision to testify was made long before the prosecutor made his argument to the jury, which was an unprecedented one in Connecticut state court criminal trials.

2. The Connecticut Supreme Court's decision included correct assessment that the policies behind the Sixth Amendment's confrontation clause were substantially impaired by the prosecutor's argument, while any countervailing policies behind the practice of argument to the jury were not substantially impaired, or not impaired at all

When there is a perceived tension between constitutional rights, "[t]he threshold question is whether compelling [an] election [between them] impairs to an appreciable extent any of the policies behind the rights involved." Crampton v. Ohio, supra, 402 U.S., at 213. As the Connecticut Supreme Court noted, the right of face to face confrontation at trial helps to ensure the integrity of the fact-finding process. State v. Cassidy, 236 Conn., at 123, quoting Coy v. Iowa, supra, 487 U.S., at 1019-20. The respondent has amplified on that in § IIA 2 of this brief.

As he also addressed in § IIA of this brief, for a prosecutor to argue to the jurors solely on the basis of the defendant's exercise of his right to face to face confrontation throughout trial that they should draw an adverse inference against him, had no compelling justification. Id. See Cassidy, 236 Conn., at 123-24, citing Maryland v. Craig, supra.

The petitioner has not claimed the prosecutor had a constitutional right to make an argument to the jury. See Pet. at 11-15. But since closing argument for the defense is guaranteed by the Sixth Amendment's right to counsel provision, applied to the states by means of the Fourteenth, Herring v. New York, 422 U.S. 853, 864-65 & n.18 (1975), closing argument for "both sides" is provided for as a matter of course. E.g., Connecticut Rules of Court § 879 (1996). So even if, arguendo, prosecutors do not have a constitutional right to make a closing argument, the analytical framework in Crampton v. Ohio, supra, for a required choice between two constitutional rights is still useful here, albeit that in Crampton the rights involved belonged to the same person.

"[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." Herring v. New York, supra, 422 U.S., at 862.

> For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions....

Id. Closing argument, like other exercises of partisan advocacy in a criminal case, is meant "to promote the ultimate objective that the guilty be convicted and the innocent go free." Ibid.

If in general, "[i]t seems particularly incongruous and indefensible...to draw inferences of lack of honesty from invocation of a priv-

ilege deemed worthy of enshrinement in the Constitution." Grunewald v. United States, 353 U.S. 391, 425-26 (1957) (Black, J., concurring); it is even more so the case when the jurors are urged to draw an inference of lack of honesty from exercise of a constitutional provision that this Court has found enhances the integrity of the fact-finding process, Coy v. Iowa, supra; and where, on top of that, the prosecutor bases his argument "solely on account of the defendant's assertion of [that] constitutional right...." State v. Cassidy, 236 Conn., at 127.

The Connecticut Supreme Court acknowledged that a prosecutor is entitled to argue his case to the jury forcefully, including, if he has the evidence to back it up, that the accused has tailored his testimony to fit the state's case. 236 Conn., at 128 & n.17. But the jury was presented in this case with a distorted picture of what was going on, which the court realized, see id., 124, and the fact that the tool the prosecutor used to do so was the respondent's exercise of a constitutional right disserved the policies behind closing argument, as was implicit in the Connecticut Supreme Court's decision. See ibid., 128-29.

III OTHER REASONS FOR DENYING THE PETITION

A. Since the respondent was required to be present at trial, he was "bushwhacked" by the prosecutor's argument, and disturbing the judgment of the Connecticut Supreme Court here so as to permit prosecutors' comments like those made in this case will require the Court to address the question of what procedures must be followed in those jurisdictions which require a defendant's presence at trial, which includes the federal courts

As the Connecticut Supreme Court also pointed out, the respondent was "required to be present at trial" under Connecticut Rules of Court § 968. State v. Cassidy, 236 Conn., 122 n.12 (emphasis in original). See also Federal Rules of Criminal Procedure, Rule 43 ("[t]he defendant shall be present...at every stage of the trial"); which has been held to

mean that "[i]t does not give a defendant a right to absent himself from the courtroom." United States v. Fitzpatrick, 437 F.2d 19, 27 (2d Cir. 1970) (trial court denied defendant's motion to waive his presence).

"[I]nsisting that the government play it straight with those it prosecutes" is a matter of fundamental fairness. Brecht v. Abrahamson, 944 F.2d 1363, 1370 (7th Cir. 1991), aff'd, 507 U.S. 619 (1993). The Seventh Circuit was discussing Doyle v. Ohio, 426 U.S. 610 (1976), and in language applicable to this case noted that the Court's decision in Doyle rested on an "anti-mousetrapping ground...." Brecht v. Abrahamson, 944 F.2d, at 1369. Such strictures apply here. A defendant required by law to be present in the courtroom throughout the trial should not be "bushwhacked by an argument that [presence] implies guilt" or dishonesty. See id., at 1368 ("[a] suspect told that he has a right to remain silent, Doyle concluded, may not be bushwhacked by an argument that silence implies guilt").

If a court should not instruct the jury that it may draw the inference that the defendant's conduct is evidence of a guilty conscience when "[t]he defendant did that which the law allows and even encourages", State v. Jones, 234 Conn. 324, 358-59, 662 A.2d 1199 (1995) (making partially successful legal arguments in court opposing state's motion to obtain blood, saliva and hair samples); then when a defendant did that which the law requires, a trial court cannot sit by and have the prosecutor turn what he did against the defendant. See id.

Moreover, if this Court were to disturb the Connecticut Supreme Court's judgment in this case, and find that the argument made by the prosecutor in this case was after all constitutionally permissible, the Court would have to deal with what, applicable to the states, and to the

federal courts, is required of trial judges in light of the possibility that a prosecutor would want to make such an argument, when that jurisdiction requires the defendant to be present at trial. Leaving undisturbed the judgment of the Connecticut Supreme Court keeps this Court from having to intrude upon the decisions made by those jurisdictions which require a defendant's presence throughout trial.

B. If appellate opinions are used as a rough guide, the type of argument made by the prosecutor in this case has been rarely made

Using the reported opinions of appellate courts nationwide as a rough guide to the frequency of occurrence of the type of argument at issue in this case, there are but a handful of cases over the past two decades or more in which courts have been asked to deal with such arguments. See State v. Cassidy, 236 Conn., at 128 (citations omitted). See also State v. Johnson, supra, and cases cited therein.

As this Court has stated, "[o]ur decision to grant certiorari represents a commitment of scarce judicial resources...." Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). Taking these factors into consideration, rudimentary cost/benefit analysis supplies yet another reason why the petition should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN CASSIDY
Respondent

BY: _____

G. DOUGLAS NASH, Public Defender

NEAL CONE, Assistant Public Defender

Office of Chief Public Defender
121 Elm Street,
New Haven, CT 06501
Tel. (203) 789-7477

Counsel of Record:
G. DOUGLAS NASH